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Nos. 07-1428 and 08-328

In the Supreme Court of the United States

FRANK RICCI, ET AL., PETITIONERS

v.

JOHN DESTEFANO, ET AL.

FRANK RICCI, ET AL., PETITIONERS

v.

JOHN DESTEFANO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR AND REMAND

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QUESTIONS PRESENTED

1. Whether respondents' failure to certify the results of promotional examinations violated the disparate-treatment provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a).

2. Whether respondents' failure to certify the results of promotional examinations violated 42 U.S.C. 2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race."

3. Whether respondents' failure to certify the results of promotional examinations violated the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF THE UNITED STATES

The Attorney General and the Equal Employment Opportunity Commission (EEOC) share responsibility for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. The Attorney General enforces Title VII against public employers and has brought numerous lawsuits challenging employment examinations under the statute's disparate-impact provisions. The EEOC enforces Title VII against private employers. The Department of Labor enforces parallel provisions in Executive Order No. 11,246, 3 C.F.R. 167 (Supp. 1965),

against federal contractors. This Court's decision could affect those enforcement efforts. In addition, Title VII's anti-discrimination provisions apply to federal employers. 42 U.S.C. 2000e-16(a) and (d). Because some federal agencies use examinations in hiring and promoting employees, the Court's decision may affect the federal government's activities as an employer.

STATEMENT

1. In 2003, the City of New Haven, Connecticut, administered written and oral promotional examinations for its fire department. 07-1428 Pet. App. 6a-7a (Pet. App.). Seventy-seven applicants took the lieutenant examination, of whom 34 passed, and 41 applicants took the captain examination, of whom 22 passed. *Id.* at 7a-8a. On the lieutenant examination, the pass rate for Hispanic applicants was 34% of the pass rate for white applicants; for African-American applicants, the pass rate was 52% of that of white applicants. On the captain examination, the pass rate for both Hispanic and African-American applicants was 59% of the pass rate for white applicants. *Id.* at 7a-8a, 27a-28a.

Under the "Rule of Three" in the City Charter, each available position could be filled only by an individual who was among the three highest scorers. Pet. App. 8a. Use of the examination scores on a rank-ordered basis would have resulted in no Hispanics or African Americans being eligible to fill any of the eight lieutenant positions that were then available, and two Hispanics and no African Americans being eligible to fill any of the seven available captain positions. *Id.* at 7a-8a, 28a.

After the examinations were administered, the New Haven Civil Service Board (Board) held hearings to decide whether to certify a list of individuals eligible for promotion based on the exam results. Pet. App. 8a, 89a;

see *id.* at 465a-589a. Under the New Haven civil service rules, the Board had 60 working days, or until March 31, 2004, to decide whether to certify the list; if certified, the list would remain in effect for two years. *Id.* at 106a; C.A. App. 1080-1082. On March 18, 2004, the Board declined to certify the exam results by a 2-2 vote. Pet. App. 19a.

2. Petitioners, all of whom are white, and one of whom is also Hispanic, filed this suit against respondents, alleging, among other things, that they were denied promotions and opportunities for promotion on account of their race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 6a, 22a. Respondents answered that the City decided not to certify the results based on a good-faith belief that using the examinations would have an unlawful disparate impact on African Americans and Hispanics, in violation of Title VII. *Id.* at 20a-21a, 939a-941a, 945a. On cross-motions for summary judgment, the district court ruled in favor of respondents on both the Title VII and equal protection claims. *Id.* at 5a-53a.

The district court rejected petitioners' claim that respondents' certification decision was pretextual because respondents had insufficient evidence that they would not have a defense to disparate-impact liability based on the job-relatedness of the examinations and the absence of other, less discriminatory selection measures. Pet. App. 29a-34a. The court explained that "it is not the case that defendants *must* certify a test where they cannot pinpoint its deficiency explaining its disparate impact * * * simply because they have not yet formulated a better selection method." *Id.* at 32a-34a.

The district court also dismissed the equal protection claim, holding that the decision not to certify the test results was not a "racial classification." Pet. App. 45a. In addition, the court found no evidence that respondents acted with "an intentionally discriminatory purpose" or "discriminatory animus" toward non-minorities. *Id.* at 47a.

3. The court of appeals affirmed in a per curiam opinion. Supp. Pet. App. 1a-3a. The court cited "the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below," and further explained that, "because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected." *Id.* at 2a-3a.

The court of appeals denied rehearing en banc. Supp. Pet. App. 4a-36a. Judge Cabranes, joined by five other judges, dissented from the denial of rehearing en banc without expressing a view on the merits. *Id.* at 11a-30a.

SUMMARY OF ARGUMENT

I. A. An employer does not violate Title VII's disparate-treatment prohibition when it decides not to certify the results of a promotional test in order to comply with the statute's disparate-impact prohibition. Petitioners' contrary reading would needlessly pit Title VII's basic anti-discrimination provisions against one another and would defeat Congress's intent to encourage employers to comply voluntarily with Title VII. Nor is declining to certify test results the equivalent of "racial balancing" or imposing "quotas." *E.g.*, Pet. Br. 20, 61. In itself, such a decision reveals nothing about how promotions will ultimately be made or the race of the persons to be promoted.

B. Although an employer may seek to comply with Title VII's disparate-impact provision without engaging in unlawful disparate treatment, the employer's proffered legitimate, nondiscriminatory reason (such as Title VII compliance) for declining to certify test results may be a pretext for racial discrimination. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-805 (1973). A jury should be permitted to disbelieve an employer's proffered rationale of voluntary compliance when the employer's concern about Title VII liability was unreasonable. Because the burden of proof in a disparate-treatment case always falls on the plaintiff, evidence that the employer's actions were unreasonable would permit, but not require, the jury to find that the employer's rationale was a pretext for race discrimination. *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 511 (1993).

C. This Court should decline to reach petitioners' contention that respondents' decision not to certify the test results violates 42 U.S.C. 2000e-2(*l*). No lower court decision has considered that issue, including the decisions below. But if the Court reaches petitioners' claim, it should reject it. A refusal to certify test results does not "adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race." *Ibid.*

II. A. A public employer's decision not to certify test results for the purpose of complying with Title VII is not subject to strict scrutiny under the Equal Protection Clause. Such a decision is facially neutral and, absent evidence of pretext, does not establish that the employer has acted with a discriminatory purpose. To be sure, when an employer acts to avoid using selection procedures that produce racially disparate effects, race is necessarily a factor in the employer's decision-making. But

this Court's precedents assume that facially neutral measures that are race-conscious are *preferable* to racial classifications; this Court has never intimated that they are subject to strict scrutiny. *E.g.*, *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792-2793 (2007) (Kennedy, J., concurring in part and concurring in judgment); *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237-238 (1995).

B. Even were this Court to apply strict scrutiny, compliance with Title VII's disparate-impact provision is a compelling governmental interest when a public employer has a strong basis in evidence that action is reasonably necessary to achieve compliance. Moreover, a decision declining to certify test results is narrowly tailored to further that compelling interest.

III. This Court should vacate the judgment below and remand for further consideration. The district court correctly concluded that a genuine intention to comply with Title VII's disparate-impact provisions does not constitute intentional racial discrimination, and that strict scrutiny does not apply to a facially neutral action taken in response to such concerns. Neither the district court nor the court of appeals, however, adequately considered whether, viewing the evidence in the light most favorable to petitioners, a genuine issue of material fact remained whether respondents' claimed purpose to comply with Title VII was a pretext for intentional racial discrimination in violation of Title VII or the Equal Protection Clause.

ARGUMENT

I. TITLE VII PERMITS EMPLOYERS TO DECLINE TO CERTIFY TEST RESULTS TO COMPLY WITH THE STATUTE'S DISPARATE-IMPACT PROVISION

A. This Case Requires The Reconciliation Of Title VII's Two Basic Anti-Discrimination Prohibitions

Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a). The statute proscribes both disparate-treatment and disparate-impact discrimination. 42 U.S.C. 2000e-2(a) and (k); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

1. To succeed on a disparate-treatment claim, a plaintiff must show that the employer intentionally discriminated on the basis of a protected trait. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). Under the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-805 (1973), the plaintiff proves that an employment practice was intentionally discriminatory first by making a prima facie case sufficient to support an inference of discrimination.[1] The defendant rebuts that showing by offering a legitimate, non-discriminatory reason for the employment action. The plaintiff then has the burden of persuasion to show that the employer's proffered reason is merely pretextual, *i.e.*, that the employer's true reason is racially discriminatory. See *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 506-508 (1993); *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253-254 (1981).

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[1] "[I]f a plaintiff is able to produce direct evidence of discrimination, he may prevail" without satisfying the *McDonnell Douglas* standard. *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 511 (2002).

2. To succeed on a disparate-impact claim, the plaintiff bears the burden of showing that an employment practice has a disparate impact on members of a protected class. 42 U.S.C. 2000e-2(k)(1)(A)(i). Such a showing establishes a prima facie violation of Title VII. *Ibid.*; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). If that showing is made, the burden shifts to the employer to prove that the practice is "job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k)(1)(A)(i). If the employer meets that burden, the plaintiff may still prevail by demonstrating that an alternative employment practice exists that has less disparate impact and serves the employer's legitimate needs, and that the employer refuses to adopt it. 42 U.S.C. 2000e-2(k)(1)(A)(ii) and (C).

To implement Title VII's disparate-impact provisions, four federal agencies have jointly adopted the Uniform Guidelines on Employee Selection Procedures. 43 Fed. Reg. 38,290 (1978); 28 C.F.R. 50.14 (Department of Justice); 29 C.F.R. Pt. 1607 (EEOC); 41 C.F.R. Pt. 60-3 (Department of Labor); 5 C.F.R. 300.103(c) (Office of Personnel Management). With certain exceptions, the Guidelines state that, if an employment examination or other selection procedure has an adverse impact, an employer's use of that procedure to hire or promote employees will be considered discriminatory unless the employer has conducted a "validity" study to establish the device's job-relatedness. 29 C.F.R. 1607.3(A), 1607.5, 1607.14. Under the "four fifths" rule of the Guidelines, "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agen-

cies as evidence of adverse impact." 29 C.F.R. 1607.4(D).

The Guidelines also state that an employer whose examination has an adverse impact should search for alternative selection devices with less adverse impact as part of the test-validation process. 29 C.F.R. 1607.3(B), 1607.15(B)(9), (C)(6) and (D)(8). Under the Guidelines, an employer whose examination has an adverse impact may forgo validation of the test if the employer adopts an alternative selection procedure without adverse impact. 29 C.F.R. 1607.6(A); 44 Fed. Reg. 12,001 (1979) (Q&A 31).

3. This case involves the intersection of Title VII's disparate-treatment and disparate-impact prohibitions. Petitioners allege that respondents engaged in disparate treatment when they refused to certify the results of promotional tests after those results revealed a disparate impact on minority firefighters. Petitioners argue that a "claimed interest in avoiding disparate-impact claims and liability is not a legitimate excuse for intentional discrimination," Br. 43, or alternatively, that the employer must have a "strong basis in evidence" before it can act to avoid the threat of disparate-impact liability, Br. 49. In a similar vein, petitioners argue that respondents' proffered reason was a pretext for discrimination because respondents lacked a strong basis in evidence for thinking that reliance on the test results would violate Title VII. Br. 48, 49.

B. Title VII Permits Employers To Take Reasonable Steps To Prevent Disparate-Impact Violations

1. An employer's purpose to comply with the disparate-impact prohibition does not constitute disparate treatment

Two features of Title VII should guide this Court to conclude that an intent to comply with Title VII's disparate-impact prohibitions does not equate with an intent to discriminate on the basis of race: (1) Congress's intent to prohibit *both* disparate-impact *and* disparate-treatment discrimination, and (2) Congress's preference for voluntary compliance by employers.

a. Title VII's ban on both disparate-treatment *and* disparate-impact discrimination reflects Congress's obvious desire that the provisions be read in harmony so that one provision does not defeat the other. See, *e.g.*, *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2336 (2007). In 1991, Congress codified the burden of proof in disparate-impact cases in a separate provision, thereby making unmistakably clear not only its intent to prohibit disparate-impact discrimination but also that a disparate impact *alone* violates Title VII unless the employer can prove job-relatedness and business necessity.

The disparate-impact provisions are triggered only when an employment practice has a disparate impact "because of * * * *race*" or "on the basis of *race*." 42 U.S.C. 2000e-2(a)(2) and (k)(1)(A)(i) (emphases added). Compliance with those provisions necessarily requires an employer to consider race (or certainly to be aware of race) when it examines its selection procedures to determine if they have any racially disparate impacts. Although petitioners assert that the City's race-coding the test-takers reflects race discrimination, Br. 10, 23,

26, 41, 46, there is nothing suspect about that practice under Title VII's disparate-impact provisions: Unless a test has been previously administered, it is difficult to see how an employer can know whether a test produces racially disparate impact without knowing the race of the test-takers.

In banning both disparate-treatment and disparate-impact discrimination, Congress saw no inherent tension between the two, but rather intended both provisions to work together "to prohibit all practices in whatever form which create inequality in employment due to discrimination." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). The structure of Title VII belies any claim that an employer's intent to comply with Title VII's disparate-impact provisions constitutes prohibited discrimination on the basis of race. "[B]y the enactment of title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement." 29 C.F.R. 1608.1(a).

A contrary conclusion would not only render the prohibitions at war with one another, but would misconstrue the meaning of an intent to discriminate "against any individual * * * because of" his or her race. 42 U.S.C. 2000e-2(a)(1). Under that provision, an employer that takes action in response to a disparate impact of an employment test among candidates generally does not thereby intend to discriminate against any individual non-minority candidate who did well on the test. Indeed, as explained, p. 27, *infra*, respondents' decision not to certify the test results adversely affected those African-American and Hispanic firefighters who did well on the tests, and benefited those white firefighters who did not pass.

Moreover, although petitioners' race, like that of minority firefighters, played a role in the employer's decision in the indirect sense that the disparate impact of the test on applicants as a general matter was taken into account, Title VII's disparate-impact prohibition necessarily requires employers to look at the impact of their procedures on persons of different races. The fact that an employer takes action in response to the racially disparate results of a test does not, however, mean that the employer's decision is based on the race of any particular candidate. Rather, where the employer acts in good faith in response to the disparate impact, the decision is based on the judgment that the tests themselves may have been racially discriminatory. Cf. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604 (1993) (decision based on pension status correlated with, but was not based on, age). An employer's concern that its test may violate Title VII thus does not equate with intentional discrimination. It is, rather, entirely consistent with Congress's core objective to *prevent* discrimination.[2]

b. Congress intended "voluntary compliance" to be the "preferred means of achieving the objectives of Title VII." *E.g.*, *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 515 (1986); *Albemarle*, 422 U.S. at 417-418. Congress's preference for voluntary compliance is founded upon sound policy considerations. Employers are better situated than courts to determine the best way to prevent discrimination in their work-

[2] Section 703(j), 42 U.S.C. 2000e-2(j), is not to the contrary. Pet. Br. 44, 46. That provision states that Title VII does not *require* employers to grant racial preferences. *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 204-207 (1979). Nothing in that provision supports the anomalous suggestion that Congress intended to prohibit employers from considering the racial impact of their employment selection procedures.

places, while simultaneously minimizing disruption to their operations and accommodating, to the greatest extent possible, the interests and expectations of employees. Accordingly, "persons subject to title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of title VII." 29 C.F.R. 1608.1(c); *Johnson* v. *Transportation Agency*, 480 U.S. 616, 626, 630 n.8 (1987); *Local No. 93*, 478 U.S. at 519.

c. The foregoing principles support the conclusion that, far from intending to prohibit employers from attempting to comply with Title VII's disparate-impact provisions, Congress wanted to encourage employers to minimize the racially disparate effects of their employment procedures.

Petitioners urge this Court to hold that, under Title VII, employers must *never* think about the impact of their tests on racial minorities (Br. 45-47, 49), or at least may do so only *before* a test is given (Br. 41). *After* the test is given, petitioners insist, and even if employers *actually know* their tests had gross exclusionary effects on minorities, employers must ignore those effects (and hope not to be sued for disparate-impact discrimination) or amass proof of a disparate-impact case against themselves (Br. 49-57). That approach would seriously undermine Congress's objectives to spur employers to examine and correct their discriminatory practices and to resolve disputes before they end up in court.

In other Title VII cases, this Court has concluded that, in light of Congress's objective to prevent harm rather than redress it through litigation, "[i]t would * * * implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to

prevent violations and give credit * * * to employers who make reasonable efforts to discharge their duty." *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 806 (1998). Similarly, the Guidelines advise employers that they are permitted to take "appropriate and lawful measures to eliminate adverse impact from selection procedures," even when doing so requires the employer to be conscious of race. 44 Fed. Reg. at 12,001 (Q&A 30). This Court should not lightly cast aside that long-standing guidance to private and public employers and the decades of experience by those employers in their good-faith efforts to comply.

Moreover, that this case involves no explicit racial classifications to make employment decisions counsels against overly restrictive requirements on employers that decline to certify test results that have severe racially disparate impacts.[3] Here, no one has been selected for promotion, much less selected based on his race. The record indicates neither how the City ultimately will make the promotion selections, nor the race of the firefighters who will ultimately be promoted, nor that the City would be precluded from certifying the very tests at issue upon further examination into their job-relatedness or alternatives. Pet. App. 301a-302a. Petitioners thus inaccurately state that this case is about "racial balancing" and "quotas." Br. 20, 30-32, 38, 39, 42, 44, 55, 60-61. And as discussed, pp. 10-13, *supra*, Con-

[3] Notably, this Court has upheld even explicit race- or gender-based classifications to remedy disparities in the workplace. *Johnson*, 480 U.S. at 626 (public agency's promotion of a woman over a more qualified male applicant under an affirmative-action plan to remedy the manifest imbalance at the agency constituted "a nondiscriminatory rationale for [the promotion] decision"); *Weber*, 443 U.S. at 209 (private employer's adoption of an affirmative-action plan was justified by a "manifest imbalance" in workforce).

gress certainly did not think that by prohibiting unjustified racially disparate effects, it was requiring "race-balancing" and "quotas."

2. An employer's refusal to certify test results does not violate Title VII when based on a reasonable belief that the test may violate Title VII

a. The issue before the Court is under what circumstances plaintiffs can prove a disparate-treatment case when the employer's proffered justification is that it acted to comply with Title VII's disparate-impact provisions. Title VII permits an employer to be motivated by compliance with Title VII, even though that intent necessarily means that the employer considered the racial impact of its employment tests. See pp. 11-12, *supra*. There is no basis, however, for concluding that Congress countenanced employers' acting out of sentiments of racial superiority or, conversely, stereotypes and prejudices. Such sentiments are entirely unrelated to any intent to comply with Title VII.[4]

Accordingly, the proper framework must serve to distinguish between, on the one hand, an employer's permissible—and, indeed, laudable—intent to correct the disparate racial impact of its employment practices and, on the other hand, an impermissible intent to discriminate on the basis of race. The *McDonnell Douglas* burden-shifting framework generally has guided courts in determining whether the plaintiff has sustained his burden of proving the employer was motivated by race.

[4] Petitioners allege that Title VII prohibits "racial politics," and that those motives drove respondents' actions. Br. 30-31, 66. To be sure, racial politics based on prejudice or racial favoritism are impermissible. But a motive to avoid the political ramifications of Title VII liability for denying equal employment opportunity is not disparate treatment on the basis of race.

See p. 7, *supra*; cf. *Johnson*, 480 U.S. at 626 ("If [an affirmative-action plan] is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual."). Accordingly, assuming supporting evidence in the record, a plaintiff should be entitled to prove that an employer's stated motive of compliance with Title VII is merely a pretext for intentional racial discrimination.

This Court has repeatedly cautioned, however, that the *McDonnell Douglas* framework, while a useful guide, was "never intended to be rigid, mechanized, or ritualistic." *St. Mary's Honor Ctr.*, 509 U.S. at 519 (quoting *USPS Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983)). Cf. Pet. Br. 48-49. The *McDonnell Douglas* framework must accommodate Congress's judgment that an employer's intent to avoid disparate-impact liability is permissible (and indeed furthers the purposes of Title VII), even though the employer necessarily takes race into account in determining whether its employment test has a racially disparate impact.

This Court should reject petitioners' proposal that a jury must be permitted to find pretext unless the employer proves a full-blown disparate-impact case against itself. By imposing such a counterintuitive burden *on employers*, such a requirement would conflict with the rule that the burden of proof in a disparate-treatment case is *always* on the plaintiff-employee claiming discrimination. *St. Mary's Honor Ctr.*, 509 U.S. at 511. Moreover, that requirement, as well as petitioners' fallback "strong basis in evidence" test (Br. 49), would threaten to "immobilize or reduce the efforts of [employers] who would otherwise take action * * * without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect

of title VII litigation." 29 C.F.R. 1608.1; see *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 545 (1999) ("Dissuading employers from [taking voluntary action] to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII.").[5]

This Court should accord substantial breathing room for employers to decide whether or not to certify test results when faced with results that establish a prima facie case of disparate-impact discrimination. Thus, when an employer advances compliance with Title VII as the reason for its actions—even though the employer necessarily was aware of the disparate racial impact of the selection procedure—the jury should be permitted to find pretext from those circumstances alone only when the plaintiff establishes that the employer's proffered motive of compliance is unreasonable. Of course, a jury is always permitted to find for a plaintiff based on other evidence that might demonstrate racial prejudice or constitute direct evidence that the employer's stated rationale is pretextual. But this Court has recognized the practical reality that most cases proceed based only on indirect evidence from which a jury is permitted (but not required) to find pretext when it discredits the employer's stated rationale. See, *e.g.*, *St. Mary's Honor Ctr.*, 509 U.S. at 511. Thus, in most cases a jury would be justified in disbelieving an employer's motive of voluntary compliance with Title VII only when that ratio-

[5] The EEOC's affirmative-action guidelines similarly state that an employer does not violate Title VII when it acts after having a "reasonable basis" to believe its selection procedures may have an adverse racial impact. 29 C.F.R. 1608.4(b)(1) and (3). This reasonable basis may exist without any admission or formal finding that the employer has violated Title VII. 29 C.F.R. 1608.4(b)(3); accord 29 C.F.R. 1608.1(c) (noting that such a "standard would undermine the legislative purpose of first encouraging voluntary action without litigation").

nale is unreasonable. In that circumstance, a jury would be entitled (but again not required) to find that the unreasonableness of the employer's actions demonstrates that the employer was using voluntary compliance as a pretext for race discrimination.

b. The reasonableness of an employer's motive will of course vary from case to case. For instance, an employer would be acting legitimately if it declined to certify employment test results based on a reasonable belief that, if the results were challenged, it may not meet its burden of showing that the test was job-related or that the challengers could show that alternatives to the test with a less discriminatory impact may exist.

Moreover, because a reasonableness standard must be flexible enough to encourage an employer to take affirmative steps to prevent a Title VII violation, an employer is not required to conduct a validity study before declining to certify test results. The Guidelines require an employer to undertake such efforts only if the employer actually wishes to select or promote persons on the basis of a test that has an adverse impact. 29 C.F.R. 1607.3.

An employer may be acting reasonably in not certifying test results even absent a validity study in a number of circumstances. The employer may wish to use an alternative selection criterion without an adverse impact. 29 C.F.R. 1607.3(A), 1607.6(A). Similarly, an employer may well be acting reasonably in temporarily suspending the selection process to investigate the possibilities of such alternatives. See Pet. App. 301a-302a. Requiring an employer to conduct a full-blown validity study whenever it declines to use a test based on its adverse impact would provide a significant disincentive for the employer to decline to use such a test, even where the employer

reasonably questions the job-relatedness of the test. Indeed, a validity study provides no sure defense to a disparate-impact lawsuit. *Albemarle*, 422 U.S. at 429-432 (rejecting validation study). An employer acts reasonably in not incurring those burdens when it has significant questions concerning a test's job-relatedness or reasonably believes that better alternatives to the test may exist.

Moreover, a high and unprecedented statistical disparity can justify a more informal consideration of possible test defects or alternative procedures, as would particular demands of state law (such as stringent and inflexible time limits for certification of tests). Conversely, an employer would not be acting reasonably for these purposes by relying on statistical disparity alone if other circumstances surrounding the test—such as existing validity studies and a known absence of alternatives—would establish the lawfulness of the test.

Inherent in the concept of reasonableness is that, in many situations, an employer would be acting reasonably either by using the test (and risking a disparate-impact lawsuit) or by declining to use the test. In all events, employers must be permitted to err on the side of compliance with Title VII.

C. An Employer's Decision Not To Certify Test Results Does Not Violate Section 703(*l*)

1. Section 703(*l*) of Title VII makes it an unlawful employment practice, in connection with the selection or referral of candidates for employment or promotion, "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(*l*). Petitioners argue that respondents' decision not to certify the tests "alter[ed] the

results of" the tests because it "manipulate[d]" the test scores and results. Br. 63.

This Court should not address that contention. Petitioners did not argue that respondents violated Section 703(*l*) in their summary-judgment papers before the district court. And neither the district court nor the court of appeals addressed that claim. Pet. App. 39a n.9 ("While * * * Title VII * * * prohibits race-norming, none is alleged to have happened here."). We also are aware of no appellate decision that addresses whether a decision *not to use* a test violates Section 703(*l*), and petitioners cite none. It would not be appropriate for this Court to address the issue without the benefit of any lower-court decision. *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

2. If this Court were to consider petitioners' contention, it should reject it. The decision not to use a test, standing alone, does not "alter the results" of the test. 42 U.S.C. 2000e-2(*l*). The term "alter" means "[t]o make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially." *Black's Law Dictionary* 71 (5th ed. 1979); cf. *MCI Telecomms. Corp.* v. *AT&T*, 512 U.S. 218, 225 (1994) ("modify" "has a connotation of increment or limitation"). When an employer decides not to certify or otherwise use the results of a test, that conduct does not change or modify the results themselves.

The structure of Section 703(*l*) also indicates that the catch-all phrase "otherwise alter the results" does not speak to the situation when the employer decides not to use the test or its results. Indeed, Section 703(*l*) is entitled "Prohibition of discriminatory *use of test scores*." 42

U.S.C. 2000e-2(*l*) (emphasis added). And in the body of the provision, the preceding phrases "to adjust the scores" and "use different cutoff scores" both involve the discriminatory use of test scores. Under well-established principles of *ejusdem generis* and *noscitur a sociis*, the catch-all phrase "otherwise alter the results" similarly refers to situations in which an employer actually uses test results in making an employment decision. *E.g.*, *Brogan* v. *United States*, 522 U.S. 398, 403 n.2 (1998); *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008).

3. The history and purpose of Section 703(*l*) further support the conclusion that the provision was intended to prevent employers from using tests for actual promotion or hiring decisions based on differential racial scoring criteria. Congress passed the provision in the 1991 amendments to Title VII to ban "race-norming" and similar practices used to alter scores or apply different scoring criteria based on race. 137 Cong. Rec. 29,045 (1991) (Sens. Danforth and Kennedy); *id.* at 30,661, 30,663 (Rep. Edwards); *id.* at 13,229-13,230 (Rep. Dornan); see, *e.g.*, *Dean* v. *City of Shreveport*, 438 F.3d 448, 463 (5th Cir. 2006); *Chicago Firefighters Local 2* v. *City of Chicago*, 249 F.3d 649, 655-656 (7th Cir.), cert. denied, 534 U.S. 995 (2001); *Bridgeport Guardians, Inc.* v. *City of Bridgeport*, 933 F.2d 1140, 1141, 1145-1146 (2d Cir.) (discussed in 137 Cong. Rec. at 29,038), cert. denied, 502 U.S. 924 (1991). An employer does not alter or manipulate test results when it decides not to use them. The history also reveals Congress's understanding that the provision "does not purport to affect how an employer * * * uses accurately reported test scores, or *to require that test scores be used at all*." 137 Cong. Rec. at 29,047 (emphasis added); *id.* at 30,664 (same).

II. THE EQUAL PROTECTION CLAUSE DOES NOT FORBID PUBLIC EMPLOYERS FROM TAKING REASONABLE STEPS TO COMPLY WITH TITLE VII'S DISPARATE-IMPACT PROVISION

A. Absent Proof Of Intentional Racial Discrimination, The Equal Protection Clause Does Not Require Strict Scrutiny Of Facially Race-Neutral State Action Undertaken To Comply With Title VII

1. Allegations of racial discrimination in public employment implicate not only Title VII, but also the Equal Protection Clause of the Fourteenth Amendment, whose "central purpose" is "the prevention of official conduct discriminating on the basis of race." *Washington* v. *Davis*, 426 U.S. 229, 239 (1976).

In enforcing that constitutional guarantee, this Court has held that "all racial classifications imposed by government" must be strictly scrutinized "to 'smoke out' illegitimate uses of race." *Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003) (quoting *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). The Court applies strict scrutiny by demanding that such classifications be "narrowly tailored to further compelling governmental interests." *Ibid.*

State action that is neutral on its face, however, is presumed to be valid; that presumption is overcome if the action is motivated by a racially discriminatory purpose. *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 272 (1979); *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). In this context, establishing discriminatory purpose requires more than proof that the governmental decisionmaker voluntarily undertook a challenged practice, or did so with awareness that the practice would have certain consequences for members of a particular racial group; it

rather requires proof that the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,'" those consequences. *Feeney*, 442 U.S. at 279.

2. Petitioners' equal protection challenge in this case does not concern an explicit racial classification, but an action neutral on its face: respondents' decision not to certify the results of promotional tests. This case is thus unlike many of the cases on which petitioner relies, which concern an employer's decision to respond to racial disparities in test results by making race an explicit factor in promotion decisions. See, *e.g.*, *Biondo* v. *City of Chicago*, 382 F.3d 680, 682-683 (7th Cir. 2004), cert. denied, 543 U.S. 1152 (2005); *Majeske* v. *City of Chicago*, 218 F.3d 816, 819 (7th Cir. 2000). In contrast to the practices at issue in those cases, a decision not to certify the results of a promotional test and instead to consider other methods of selecting candidates for promotion "neither says nor implies that persons are to be treated differently on account of their race." *Crawford* v. *Board of Educ.*, 458 U.S. 527, 537 (1982).

Petitioners contend (Br. 23-27) that respondents' decision is nevertheless subject to strict scrutiny under the Equal Protection Clause because the decision was "motivated by race, relying solely on racial-distribution information about the candidates, and with a starkly disparate racial harm," Br. 24, or, in the alternative, because the decision was "a pretext for [respondents'] desire * * * not to promote white firefighters precisely because they were white," Br. 25.

Of those arguments, only the last—if borne out by the evidence, see pp. 32-33, *infra*—would provide a basis for searching review. If respondents' decision were found to have been motivated by a purpose to advantage

or disadvantage individuals on the basis of their race, then the decision would be presumptively invalid and would require careful examination under the Equal Protection Clause. See, *e.g.*, *Arlington Heights*, 429 U.S. at 266-267, 270 n.21.

3. Absent a finding of pretext, however, respondents' facially neutral decision not to use the results of tests they believed to be unlawful does not trigger strict scrutiny. Petitioners' other arguments—that respondents' certification decision was in some sense race-conscious, relied on racial-distribution information about the candidates, and had a disparate racial effect—are not in themselves sufficient to establish that respondents' facially neutral decision was motivated by a discriminatory purpose, nor do they otherwise call for heightened review.

a. As explained, pp. 11-12, *supra*, when a public employer refuses to certify test results because of concerns that the test had an unlawful racially disparate impact on minority applicants, that does not mean that the employer has acted with a discriminatory purpose. Such a decision is certainly race-conscious in the limited sense that consideration of racially disparate effects necessarily requires consideration of the race of persons affected (and often, as petitioners emphasize, Br. 23, the use of "race-coded lists"). But such a decision, without more, does not establish that the employer was motivated by an intent either to favor minority applicants or to disfavor white applicants in the promotion process *because of* their race. Rather, such a decision establishes only that the employer intended to "remov[e] * * * unnecessary barriers to employment" that it believed to be racially discriminatory in operation. *Griggs*, 401 U.S. at 431. The desire to remove an unnecessary barrier to equal employment opportunity is not the equivalent of inten-

tional racial discrimination against those otherwise able to surmount it.

Nor has this Court held that strict scrutiny applies to facially race-neutral action merely because it can be said to have been race-conscious in the sense that it is designed to address racial issues. Cf. *Crawford*, 458 U.S. at 538 (noting the distinction between "state action that discriminates on the basis of race" and "state action that addresses, in neutral fashion, race-related matters"). This Court has instead repeatedly pointed to facially neutral measures as preferred means of achieving even avowedly race-conscious goals. See, *e.g.*, *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237-238 (1995); *Croson*, 488 U.S. at 509-510 (plurality opinion). Indeed, in determining whether an explicit racial classification is narrowly tailored under a strict-scrutiny analysis, this Court considers whether the governmental actor has considered the availability of race-neutral alternatives to accomplish the same race-conscious goal that it intended to achieve with the explicit classification. See *Grutter*, 539 U.S. at 339-340. The Court has never suggested that those facially race-neutral alternatives themselves must satisfy strict scrutiny.

In the education context, for example, a number of Members of this Court have expressed the view that facially race-neutral means of promoting racial integration or diverse student bodies are not subject to strict scrutiny. See, *e.g.*, *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792-2793 (2007) (Kennedy, J., concurring in part and concurring in judgment) (governmental actors "should be permitted to employ" certain "race-conscious" but "facially race-neutral" mechanisms "with confidence that a constitutional violation does not occur whenever a decisionmaker considers

the impact a given approach might have on students of different races"); *Gratz* v. *Bollinger*, 539 U.S. 244, 297-298 (2003) (Souter, J., joined by Ginsburg, J., dissenting) ("there is nothing unconstitutional" about "race conscious" university admission systems that guarantee admission to a fixed percentage of the top graduates from each high school); see also *Grutter*, 539 U.S. at 361-362 (Thomas, J., joined by Scalia, J., concurring in part and dissenting in part) (suggesting that certain facially race-neutral "admissions methods, such as accepting all students who meet minimum qualifications," are a permissible means of achieving "a racially aesthetic student body without the use of racial discrimination").

Public employers, like public educational institutions, are entitled to "consider[] the impact a given approach might have on [individuals] of different races," *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment), and to take race-neutral steps to avoid making employment decisions that have a discriminatory racial impact.

b. Nor does the fact that the decision not to certify the results of the 2003 exams may have had "disparate racial harm," Pet. Br. 24, warrant application of strict scrutiny. As petitioners themselves acknowledge, "the Equal Protection Clause forbids only intentional racial discrimination in governmental employment, not mere disparate impacts." *Id.* at 29 (citing *Davis*, 426 U.S. at 242).

In certain, "rare" cases, a "stark" pattern of racially disparate effects, standing alone, may support a finding of a racially discriminatory motive, but ordinarily "impact alone is not determinative." *Arlington Heights*, 429 U.S. at 266 (citing, inter alia, *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), and *Gomillion* v. *Lightfoot*, 364 U.S. 339

(1960)). This case involves no such stark pattern. As an initial matter, it is not clear that respondents' decision, in itself, had *any* necessary effect, other than delay, since no applicants, including petitioners, have yet been refused promotions altogether as a result of the respondents' decision. See p. 14, *supra*.

In any event, to the extent that respondents' decision constituted a definitive determination not to make promotions on the basis of the 2003 examinations, the effects of that decision, standing alone, likewise are insufficient to establish intentional racial discrimination. The decision, moreover, burdened not only white firefighters, but also two Hispanic firefighters who would have been immediately eligible for promotion had the test results been certified, see Pet. Br. 26, and other minority firefighters who would have been eligible for promotion during the two-year life cycle of the results, see *id.* at 26 n.11. Conversely, the decision benefited those white firefighters who failed the tests and may well fare better if another test is administered. See Pet. App. 429a-436a.

B. Even If Subject To Strict Scrutiny, An Employer's Decision Not To Certify Test Results Is Constitutional If There Is A Strong Basis In Evidence For Believing That The Decision Was Reasonably Necessary To Comply With Title VII

Absent proof of intentional discrimination, a public employer's facially neutral decision not to employ the results of a promotional test because of Title VII disparate-impact concerns does not merit the same degree of searching review as, for example, a decision to give special consideration to minority candidates because of their race. But even if the same standard of review did apply, such a decision may nevertheless be upheld as constitutional. Strict scrutiny is a demanding standard,

but this Court has repeatedly rejected the notion that it is "strict in theory, but fatal in fact." *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 237).

1. Compliance with Title VII, including its disparate-impact provisions, is undoubtedly a compelling governmental interest. Although, as petitioner notes (Br. 28), this Court has not squarely held that state actors have a compelling interest in avoiding practices with disparate racial effects, the Court has consistently *assumed* it in the analogous context of the so-called "results test" of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973(a), see, *e.g.*, *Bush* v. *Vera*, 517 U.S. 952, 977 (1996) (plurality opinion), and a number of Justices have clearly endorsed the proposition, *id.* at 990, 992, 994 (O'Connor, J., concurring); *id.* at 1033-1034 (Stevens, J., dissenting); see also *id.* at 1065 (Souter, J., dissenting).

In evaluating governmental interests in avoiding disparate results in voting cases, the Court has applied the same standard it has applied to efforts to remedy past intentional discrimination: The government must have a "strong basis in evidence" for concluding that predominantly race-based action, such as creating majority-minority districts in a manner inconsistent with traditional districting principles, is "reasonably necessary" to comply with the Voting Rights Act. *Vera*, 517 U.S. at 977 (citation omitted); see, *e.g.*, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986). Notably, however, the Court does not require state actors to *prove* the existence of a violation to justify taking action to avoid or remedy it; such a rule would "severely undermine" incentives to comply with the civil rights laws. *Id.* at 290 (O'Connor, J., concurring in part and concurring in judgment). Thus, if strict scrutiny applies in this context—despite the race-neutral nature of the action—an em-

ployer has a constitutionally sufficient interest in declining to use the results of a test when it has a strong basis in evidence for believing that the decision is reasonably necessary to comply with Title VII.

2. To the extent that petitioners (Br. 28, 33) invite the Court to hold that a purpose to comply with Title VII's disparate-impact provisions can *never* be a compelling interest, no matter how well-founded the Title VII concern, the Court should decline.

As a preliminary matter, if petitioners intended in their lower-court briefs to suggest that *any* effort voluntarily to comply with Title VII's disparate-impact provisions necessarily violates the Equal Protection Clause, they did not make that intent plain in their district court papers. See Pet. Rev. Summ. J. Mem. 68. Additionally, neither lower court addressed the question. This Court ordinarily does not review arguments that were not passed on below, see, *e.g.*, *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976), and the Court should be particularly hesitant to depart from that practice here. Petitioners' contention is one that strikes at the heart of a legal regime that is founded on this Court's decision in *Griggs*, and that has, over the ensuing decades, become an essential component of the way both employers and employees understand their duties and rights in the workplace. To the extent the Court might otherwise be inclined to believe the issue warrants review, despite that long-settled practice, it should, at a minimum, wait for a case in which the issue has been fully ventilated in the lower courts.

In any event, petitioners' argument (Br. 28) appears to rest primarily on their citation of *Wygant*, in which the Court held that an interest in remedying "[s]ocietal discrimination" is too "amorphous a basis for imposing

a racially classified remedy." 476 U.S. at 276 (plurality opinion). *Wygant* is, however, inapposite, since this case does not concern an asserted interest in remedying "societal discrimination," but an employer's interest in avoiding liability for its own use of a test that has racially discriminatory effects. As noted above, the Court has consistently assumed that similar interests are, in fact, compelling. This case, moreover, does not involve a "racially classified remedy," *ibid.*, but rather concerns facially neutral measures.

Petitioners also argue (Br. 29-33) that permitting employers to rely solely on a "stated, unfounded, 'good faith' fear of Title VII suits" to justify racial classifications could lead to "racial balancing," "crude racial politics," and "de facto quotas." The answer to petitioners' concern about permitting employers to rely on "unfounded" fears of Title VII suits is, of course, to require that the fear be sufficiently founded in evidence (if strict scrutiny applies), and that employers' responses be narrowly tailored. The answer is not categorically to bar employers from voluntarily complying with Title VII's disparate-impact provisions, no matter how well-founded their fear of liability.

3. Under a strict-scrutiny analysis, if a public employer's interest in avoiding a Title VII disparate-impact violation is sufficiently well-founded, that interest justifies declining to make promotions based on tests with racially disparate impacts.

"The purpose of the narrow tailoring requirement is to ensure that the means chosen fit th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Grutter*, 539 U.S. at 333 (brackets in original) (internal quotation marks omitted). In un-

dertaking the narrow-tailoring inquiry, this Court may consider, among other factors: the necessity for the relief and the efficacy of race-neutral alternative remedies; the flexibility and duration of the relief; and the impact of the relief on the rights of third parties. See *United States* v. *Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); *id.* at 187 (Powell, J., concurring).

If respondents' decision not to certify exam results is found to have been based on a well-founded concern about Title VII disparate-impact liability, there can be little question that it was also narrowly tailored to address that concern. As previously noted, the decision is itself facially neutral. The effects of the decision are necessarily limited in duration, since the City has a continuing need to fill vacancies. Finally, the decision not to certify test results does "not unduly harm members of any racial group." *Grutter*, 539 U.S. at 341. To be sure, those candidates who performed well on the exams may legitimately be disappointed and frustrated. Pet. App. 42a n.11. But that disappointment is not in itself the sort of "unacceptable burden" on innocent persons, *Paradise*, 480 U.S. at 182 (plurality opinion), that must frustrate the accomplishment of compelling interests as a constitutional matter.

Petitioners contend (Br. 40-41) that respondents' action cannot be a narrowly tailored response to their concern that the tests were unlawfully discriminatory under Title VII, because the tests were "carefully designed to mitigate anticipated adverse impact," and because the City could have taken other steps before administering the tests, such as "provid[ing] tutoring programs and encourag[ing] minorities with leadership potential to participate," to "further reduce any anticipated disparity." Petitioners' contention misses the point that

even a test "carefully designed to mitigate anticipated adverse impact" may nevertheless prove, after administration, to have an adverse impact that violates Title VII. For an employer who discovers, after the fact, that it may have administered such a test, petitioners' preferred before-the-fact courses of action are no longer relevant options.

III. THIS COURT SHOULD VACATE THE JUDGMENT BELOW AND REMAND FOR FURTHER CONSIDERATION

The district court rejected petitioners' Title VII disparate-treatment claim on the ground that a motivation to avoid making promotion decisions based on tests with an adverse racial impact "does not, as a matter of law, constitute discriminatory intent." Pet. App. 43a. It rejected petitioners' equal protection claim for similar reasons, concluding respondents' decision did not result in any explicit racial classification and was not motivated by racial animus. *Id.* at 47a.

The district court correctly concluded that a genuine intention to comply with Title VII's disparate-impact provisions does not constitute intentional racial discrimination, and that the Equal Protection Clause does not bar facially neutral action taken in response to such concerns. The court did not, however, adequately consider whether, viewing the evidence in the light most favorable to petitioners, a genuine issue of material fact remained on petitioners' disparate-treatment claim, including whether respondents' claimed concern about Title VII liability was a pretext for intentional racial discrimination. Although the district court cited evidence before the Board that could raise legitimate concerns about the severity of the disparate impact, the validity of the test, and the possible availability of alter-

natives, see Pet. App. 9a-19a, 27a-28a, 32a-34a, the district court's opinion could be read to suggest that a disparate impact alone is always sufficient, see *id.* at 37a-39a, 40a n.10, 43a, 47a; the court did not in any event consider whether respondents' Title VII concerns were reasonable; and the court cited possible reasons for respondents' actions other than complying with Title VII, *id.* at 47a. Similarly, the court of appeals stated that respondents' decision was "protected" because "the Board was simply trying to fulfill its obligations under Title VII," without addressing the question of pretext. Supp. Pet. App. 3a.

This Court on its own could review the record in this case to see if summary judgment was appropriate under the standards set forth in this brief. The Court's usual practice, however, is to remand to the lower courts to apply the appropriate standard as announced by this Court. See, *e.g.*, *Allison Engine Co.* v. *United States ex rel. Sanders*, 128 S. Ct. 2123, 2131 (2008); *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 128 S. Ct. 1140, 1147 (2008). Particularly in light of the voluminous record in this case, it would be appropriate for this Court to remand for consideration of whether respondents' claimed Title VII concerns were a pretext for intentional racial discrimination.[6]

For similar reasons, a remand would also be appropriate on respondents' equal protection claim. That would be so even if the Court were to accept petitioners' submission that strict scrutiny applies to a facially neutral decision not to use test results because of Title VII

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[6] Notably, even before this Court, petitioners' allegations have alternated between racial and nonracial reasons for respondents' action. See 07-1428 Pet. 13 (claiming that respondents were actually motivated by nepotism, not race).

disparate-impact concerns, regardless of whether the employer intended to discriminate against any particular applicant because of his race. The lower courts did not address that issue at all.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings consistent with the position set forth in this brief.

Respectfully submitted.

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FEBRUARY 2009